INDEX.

	Page
Petition	1
Opinions below	1
Jurisdiction	2
Statutes involved	2
Summary statement of matter involved	2
Specification of error	4
Questions presented	4
Reasons for granting the writ	5
Prayer for writ	6
Brief	9
Point I. The Circuit Court of Appeals erred in concluding that Massachusetts law barred recovery	9
A. Examination of the ultra vires doctrine	9
B. The doctrine of ultra vires as it has been applied in Massachusetts	11
Point II. The Circuit Court's confusion in seeking the "Rule of Decision" as required by Section 34 of Federal Judiciary Act in a case where there are no decisions squarely in point by any State court in the State involved presents an important question of Federal law which has not been, but should be, settled by this Court	16
A. The split in the opinions of the justices was due to the lack of a guiding principle in the application of Section 34 of the Judiciary Act in the situation presented by the case at bar	16
B. The result reached by the Circuit Court in its application of Section 34 is in conflict with decisions of other Circuit Courts of Appeals on the same matter	17

Page

C. Regardless of which view this Court should adopt as to the proper application of Section 34 of the Judiciary Act, a reversal of the Circuit Court opinion will be required 18

TABLE OF AUTHORITIES CITED.

Cass Bank and Trust Company v. Sheehan, 97 F. (2d) 935 6, 17
Chester Glass Company v. Dewey, 16 Mass. 94 11
Davis v. Old Colony Railroad, 131 Mass. 258 12
Erie Railroad v. Tompkins, 304 U.S. 64 5
Hagan & Company v. The Washington Water Power Company, 99 F. (2d) 614 6, 17
McLean Co. v. Sidebottom, 277 Mass. 158, 178 N.E. 284 14
National Pemberton Bank v. Porter, 125 Mass. 333 11
New York Life Insurance Company v. Jackson, 98 F. (2d) 950, writ of cert. den'd, 305 U.S. 640 6, 17
Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N.E. 776 13, 14
Nowell v. Equitable Trust Company, 249 Mass. 585, 144 N.E. 749 14
Old Colony Railroad v. Evans, 6 Gray, 25 11, 12
Sampson v. Welch, 23 Fed. Supp. 271 6, 17
Slater Woolen Co. v. Lamb, 143 Mass. 420, 9 N.E. 823 12
Travelers Indemnity Company v. Plymouth Box & Panel Company, 99 F. (2d) 218 6, 17

Federal Judiciary Act of September 24, 1789, Sec. 34 (1 Stat. at L. 73, 92, chap. 20, 28 U.S.C. sec. 725) 2, 4, 5, 9, 16, 17, 18
Judicial Code, Sec. 240(a) (28 U.S.C. 347(a), as amended February 13, 1925, chap. 229, sec. 1, 43 Stat. 938) 2

	Page
Uniform Business Corporation Law, secs. 10 and 11	11
17 Calif. L.R. 529	11
Carpenter, "Should the Doctrine of Ultra Vires be Discarded," 33 Yale L.J. 49	10
Fletcher, vol. 7, Ency. Corporations (1931), p. 619; 1940 Supp. p. 94	10
Handbook of the National Conference of Commissioners on Uniform State Laws (1928), pp. 334-335, 357-362	11
Note 16, Boston Univ. L. Rev. 194-199	10
4 U. of Cinn. L.R. 419, 434	11
12 Wisc. L.R. 417	11
12 Wisc. L.R. 473	11

In the

Supreme Court of the United States.

OCTOBER TERM, 1941.

JAMES A. HERBERT, TRUSTEE,
Petitioner,
v.
WILLIAM F. SULLIVAN ET AL.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Opinions Below.

The opinion of the District Court of the United States for the District of New Hampshire by Morris, J., was handed down February 24, 1941 (R. 7). An amended opinion was filed March 17, 1941 (R. 12). The judgment of the District Court was entered March 25, 1941 (R. 16). This opinion is reported in 37 Fed. Supp. 468 (1941).

The opinion of the United States Circuit Court of Appeals for the First Circuit was handed down November 14, 1941 (R. 41), and is reported in F. (2d) (1941).

Jurisdiction.

The date of the judgment to be reviewed is November 14, 1941 (R. 45).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code (28 U.S.C. 347(a), as amended February 13, 1925, chap. 229, sec. 1, 43 Stat. 938).

Statutes Involved.

The statute involved is Section 34 of the Federal Judiciary Act of September 24, 1789 (1 Stat. at L. 73, 92, chap. 20, 28 U.S.C. sec. 725), which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Summary Statement of Matter Involved.

This is an appeal by the duly appointed and qualified trustee in bankruptcy (R. 17) of the Commercial Brewing Company, a corporation organized under the laws of Massachusetts (R. 2), from judgments for the respondents entered March 25, 1941 (R. 16), in the District Court of the United States for the District of New Hampshire, by order of Morris, J., in accordance with his opinions of February 24, 1941 (R. 7), and March 17, 1941 (R. 12) (37 Fed. Supp. 46[illegible]), and affirmed by the United States Circuit Court of Appeals for the First Circuit, November 14, 1941 (R. 41) (F. (2d) , 1941).

The petitioner as trustee in the courts below sought to hold the respondents individually liable on a promissory

negotiable instrument (R. 3). The respondents are residents of Nashua in the State of New Hampshire and are the executors of the Estate of John D. Sullivan, late of that city (R. 19). The petitioner is a resident of Massachusetts (R. 7).

Jurisdiction is based upon diversity of citizenship and an amount in controversy in excess of $3000.

The note upon which this action was brought reads as follows (R. 3):

"$5,000.00—

Nashua, New Hampshire.
Oct. 31, 1935.

On demand after date I promise to pay to the order of the Commercial Brewing Company, of Charlestown, Massachusetts, Five Thousand and no/100 Dollars payable at its office with interest at five per cent per annum value received. Secured by collateral one hundred shares Commercial Brewing Company stock.

William F. Sullivan
Mary J. Cody
Ellen M. McMurrer.
Executors of the Will of
John D. Sullivan."

The $5000 received for this note was used by the respondents to pay bills of the estate (R. 24). No part of it has ever been repaid, and no interest has ever been paid on it (R. 29). Demand, which was duly made by the petitioner herein on August 27, 1940 (R. 25), was not complied with by the respondents (R. 29). This suit against the respondents individually was brought on November 6, 1940 (R. 2). The stock pledged as collateral is now valueless (R. 29).

The respondents, as executors, were not authorized by the will, nor by license of the New Hampshire Probate

Court, to borrow money or to pledge stock (R. 19). The negotiations for the loan were carried on in Massachusetts (R. 21). The note was executed in Nashua, New Hampshire, and was payable at the office of the Commercial Brewing Company in Massachusetts (R. 21).

Acting pursuant to a suggestion contained in a letter to counsel written by Morris, J. (R. 4), after the close of the evidence in the District Court, respondents amended their answer by adding thereto the defense "that the contract or agreement set forth in the Plaintiff's complaint is *ultra vires* the Plaintiff corporation . . ." (R. 7).

The trial court based its finding for the respondents in part upon this defense of *ultra vires* (R. 15). The Circuit Court based its affirmance of the judgment entirely upon this defense (R. 41). It is not disputed that the Commercial Brewing Company had no power under its charter to make loans of money (R. 43).

Specification of Error.

The Circuit Court of Appeals erred:

(1) In holding that the petitioner cannot recover on the note under Massachusetts law;

(2) In its application of Section 34 of the Federal Judiciary Act of September 24, 1789 (1 Stat. at L. 73, 92, chap. 20, 28 U.S.C. sec. 725).

Questions Presented.

The questions here to be presented are:

(1) Does the law of Massachusetts require a finding for respondents in a suit on a note, for which note the corporation had paid respondents $5000, because the loaning of money was *ultra vires* the corporation?

(2) What is the duty of a Federal court in seeking the "rule of decision" as required by Section 34 of the Federal Judiciary Act of September 24, 1789, in a case where there are no decisions squarely in point by any State court in the State involved?

Should a Federal court be permitted to anticipate what a Massachusetts court would hold where there are no controlling decisions, in the manner the majority of the Circuit Court of Appeals in the case at bar apparently attempted? Or should the Federal court be free to apply its independent judgment in order not to extend an undesirable rule beyond the clear holdings of decided Massachusetts cases as the dissenting Justice of the Circuit Court in the case at bar apparently contended?

Reasons for Granting the Writ.

The Circuit Court has decided an important question of local law in a way in conflict with applicable local decisions. While no cases exactly in point have been decided by any court in Massachusetts, those cases which have been decided clearly indicate that the Massachusetts courts, if presented with the situation involved in the case at bar, would have reached a result contrary to the Circuit Court decision. This is made even more clear by an examination of most recent trends in the doctrine of *ultra vires* throughout the country.

The members of the Circuit Court have split on an important question of Federal law which has not been, but should be, settled by the Supreme Court. Section 34 of the Judiciary Act of September 24, 1789, has of late been reexamined by this Court in a series of opinions commencing with *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). While many of the problems raised by that opinion have been settled by this Court in its later opinions, the question in-

volved in this case is as yet unsettled. This Court has pointed out the great public importance involved in the relationship of the Federal and State courts. In the situation of the case at bar no clear rule has been laid down as to the solution of the dilemma in the application of State law in a situation where there is no direct holding by any State court on the question involved. That dilemma led to a division among the justices of the Circuit Court in the case at bar. That dilemma has split the Circuit Courts of Appeals throughout the country in their efforts to achieve a guiding principle. The ramifications of this division are apparent upon comparison of the following cases: *New York Life Insurance Company* v. *Jackson* (C.C.A. 7th, 1938), 98 F. (2d) 950, writ of *cert. den'd,* 305 U.S. 640 (1938); *Travelers Indemnity Co.* v. *Plymouth Box & Panel Company* (C.C.A. 4th, 1938), 99 F. (2d) 218; *Cass Bank and Trust Company* v. *Sheehan* (C.C.A. 8th, 1938), 97 F. (2d) 935; *Hagan & Company* v. *The Washington Water Power Company* (C.C.A. 7th, 1938), 99 F. (2d) 614; *Sampson* v. *Welch,* D.C. (1938), 23 Fed. Supp. 271.

It is of paramount importance that this Court resolve the dilemma and announce a principle of general application. The case at bar furnishes an excellent vehicle to this Court for this purpose in view of the fact that the members of the Circuit Court differed on this precise point.

Prayer for Writ.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the First Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the First Circuit, had in the

case numbered and entitled on its docket, No. 3693, *James A. Herbert, Trustee, Plaintiff, Appellant,* v. *William F. Sullivan et al., Defendants, Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the First Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

JAMES A. HERBERT,
Pro Se.

Dated December 23, 1941.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

For the opinion below, jurisdiction, statutes involved, summary statement of matter involved, specifications of errors, questions presented, reasons for granting the writ, and prayer for writ, we respectfully refer the Honorable Court to the petition contained above.

Point I.

THE CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT MASSACHUSETTS LAW BARRED RECOVERY.

The majority is in accord with the dissenting justice that there are no Massachusetts cases squarely in point and that the Massachusetts law is not entirely clear. In such a situation the duty of a Federal court in seeking the "rule of decision" as required by Section 34 of the Federal Judiciary Act lies in either of two alternatives: It may examine relevant decisions and dicta of the Massachusetts courts and apply as the "rule of decision" that rule which in its opinion a Massachusetts court would have applied if the action was originally brought in the State court, or it may exercise its independent judgment and apply what it considers the most equitable principle as its "rule of decision." Which of these two alternatives it must take is a matter which should be decided by this Court, and which will be discussed in Point II of this Brief. It is the contention under Point I herein that, regardless of which alternative it should have taken, the Circuit Court decision, as it now stands, satisfies neither, and should be reversed on that basis.

A. Examination of the Ultra Vires Doctrine.

In order to ascertain the probable result if this cause had been brought in a Massachusetts State court, it is neces-

sary to critically examine the *ultra vires* doctrine as it has been applied generally and in the Massachusetts courts. In view of the fact that the Massachusetts courts have not of late passed upon this doctrine, recent trends supply an essential background in anticipating what future Massachusetts policy as to this doctrine will be.

The doctrine has been the subject of much adverse criticism in recent times. As the dissenting justice in the case at bar remarks: "This kind of defense is not so fashionable as it once was, and we ought not to be astute to extend it . . ." (R. 45).

See Fletcher, vol. 7, Ency. Corporations (1931), p. 619; 1940 Supp. p. 94.
Note, 16 Boston Univ. L. Rev. 194-199.
Carpenter, "Should the Doctrine of Ultra Vires be Discarded," 33 Yale L.J. 49.

Where recovery is sought against a corporation based on an *ultra vires* transaction, the doctrine has some meaning if the paramount policy is conceived to be the protection of the stockholders and creditors of the defending corporation. It may be that recovery based on activities beyond the scope of corporate powers should be limited to the amount of benefit received by the corporation. But to pervert this shield, as in the case at bar, so that it provides a defense to an action by a corporation to recover the value of benefits it has conferred upon others, is to discard all reason and to use the doctrine for a vindictive purpose, if there be purpose in it at all.

In recent years State legislatures, convinced of the injustice of the doctrine, and loath to await the evolvement of more salutary principles by the courts, have changed the effect of the doctrine by statute. In 1915 Vermont enacted the first statute of this type. In 1924 the Commissioner

on Uniform State Laws recommended a provision on this subject in the Ninth Draft of the Uniform Business Corporation Law. This provision became Sections 10 and 11 of the final draft of that law recommended in 1928.

See Handbook of the National Conference of Commissioners on Uniform State Laws (1928), pp. 334-335, 357-362.

The provisions of this Uniform Act have since been adopted in Louisiana, Idaho, Washington and Indiana.

See 4 U. of Cinn. L.R. 419, 434 (1930).
12 Wisc. L.R. 473 (1937).

More recently, statutes which go even further in abolishing the *ultra vires* doctrine have been adopted in California, Illinois, Michigan, Ohio, Minnesota, Pennsylvania and Wisconsin.

See 17 Calif. L.R. 529 (1929).
12 Wisc. L.R. 417 (1937).

B. The Doctrine of Ultra Vires as it has been Applied in Massachusetts.

The earliest cases in Massachusetts allowed a one-sided type of plea, allowing the corporation to plead *ultra vires,* but estopping the other party from so defending. This made for a rational and intelligible distinction.

See *Chester Glass Company* v. *Dewey,* 16 Mass. 94.
Old Colony Railroad v. *Evans,* 6 Gray, 25.
National Pemberton Bank v. *Porter,* 125 Mass. 333.

The *Old Colony* case, cited above, involved a suit by a corporation to specifically enforce an *ultra vires* contract for the sale of land. The defendant was estopped from pleading *ultra vires*, the Court stating at page 27:

> "A court of equity will enforce against a natural person his agreement to purchase of a corporation lands which it holds in violation of its charter, but will not enforce against a corporation its agreement to purchase lands for a purpose not authorized by its charter. The distinction is obvious: in the latter case to enforce the agreement against the corporation is to compel the application of its funds for a purpose not authorized by law; in the former case to compel the individual to take and pay for the property according to his agreement is the surest and most factual means of replacing in the treasury of the corporation, for its lawful use and the benefit of its stockholders, the funds which it had misapplied."

Davis v. *Old Colony Railroad*, 131 Mass. 258 (1881), involved a suit on an *ultra vires* guaranty against a corporation. The corporation was permitted to set up the defense. It is significant, however, that the corporation was the defendant and that no benefit was conferred upon the corporation in exchange for its assuming liability on the guaranty. Furthermore, the Court reviewed the older cases cited above and alluded to the distinction there made with favor at page 273.

In *Slater Woolen Co.* v. *Lamb*, 143 Mass. 420, 9 N.E. 823 (1887), a corporation was permitted to recover in an action of contract against a defendant who attempted to set up a plea of *ultra vires*. The Court stated at page 422:

> "If it be assumed in favor of the defendant that the contracts of sales in the case at bar were *ultra vires*

of the corporation, they were not contracts which were prohibited or contracts which were void as against public policy or good morals. The defect in them was that the corporation exceeded its powers in making them. The defendant under these contracts has received the goods and retained and used them. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods."

The next landmark in Massachusetts law is the famous case of *Nims* v. *Mt. Hermon Boys' School*, 160 Mass. 177 (1893), 35 N.E. 776. Justice Knowlton held a corporation liable in an action for a tort committed while the corporation was engaged in an *ultra vires* transaction, stating at page 179:

"Courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail, that to allow it would work injustice and accomplish legal wrong. Many cases might be supposed in which it would be unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might have in a supposable case where another had put himself at a disadvantage on the faith of the contract with him to commit a crime."

In *Nowell* v. *Equitable Trust Company*, 249 Mass. 585, 144 N.E. 749 (1924), a contract of guaranty was again involved and the Court permitted a corporation to set up the defense of *ultra vires* in a case where the corporation had not received any benefit for assuming the liability of the guaranty.

McLean Co. v. *Sidebottom*, 277 Mass. 158, 178 N.E. 284 (1931), is a case practically in point with the case at bar. It involved an action brought on a note received in an *ultra vires* transaction by a corporation. The case is prevented from becoming controlling authority due to the fact that the defense of *ultra vires* was not properly set up by the defendant in his answer. The language of the Court, however, makes it absolutely clear that, if the defense had been set up, it would have been rejected. At page 159 Mr. Chief Justice Rugg states:

> "If it be assumed that the defense of *ultra vires* was open the case at Bar comes within the principle stated by Mr. Justice Knowlton in *Nims* v. *Mt. Hermon Boys' School* . . . concerning contracts by a corporation outside its charter powers."

After quoting the portion from the *Nims* case, contained in our Brief, *supra*, the Court at page 159 stated:

> "That is a just and salutary principle. It would be contrary to every dictate of fair dealing and good conscience to permit a defendant to retain the proceeds of a loan inadvisably made to him by a corporation. At this stage of the case the distinction between a count for money lent and a count for money had and received by the plaintiff for the defendant's account is purely formal and ought not to be permitted to stand in the way of the accomplishment of manifest justice."

Perhaps the most adequate summary of Massachusetts law is contained in the illuminating dissent of Justice Magruder in the case at bar (R. 44). He states:

> "The opinion of the court cites four Massachusetts cases for the proposition that an *ultra vires* contract is void, no action thereon being maintainable. . . . (citing 4 Mass. cases). These are all cases of suits against the corporation on an *ultra vires* promise. It does not necessarily follow that *ultra vires* may be invoked as a defense when the corporation is suing the other party to a bilateral contract; the Massachusetts law on this is not entirely clear. . . . It is at least understandable to argue that if the *ultra vires* promise of the corporation is void, it is not good consideration to support a counterpromise by the other party. However that may be, the present is not a suit on a bilateral contract. It is a suit on the unilateral promise of the defendants contained in the note. Even though an *ultra vires* promise of the corporation may not be good consideration for a counterpromise, I do not see why the corporation's act of handing over the money should not be regarded as good and sufficient consideration to support the defendant's unilateral promise, and I find no decisions in Massachusetts holding the contrary on facts like the present. . . . This kind of defense is not so fashionable as it once was, and we ought not to be astute to extend it beyond the clear holding of the Massachusetts cases."

Point II.

THE CIRCUIT COURT'S CONFUSION IN SEEKING THE "RULE OF DECISION" AS REQUIRED BY SECTION 34 OF THE FEDERAL JUDICIARY ACT IN A CASE WHERE THERE ARE NO DECISIONS SQUARELY IN POINT BY ANY STATE COURT IN THE STATE INVOLVED PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Split in the Opinions of the Justices was Due to the Lack of a Guiding Principle in the Application of Section 34 of the Judiciary Act in the Situation Presented by the Case at Bar.

Woodbury, J., states in the majority opinion: "While none of the Massachusetts cases above cited is squarely in point, we feel that the language used by the Court therein indicates that it would be held in Massachusetts that in the case at Bar no action could be maintained on the note." This reveals an attempt by the majority to predict the result if the action had been brought in a Massachusetts State court. Magruder, J., in his dissent states (R. 45): "Mindful of our duty under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938) I still think we are free to hold that under the Massachusetts law the defense of *ultra vires* is not available to the defendants in a suit against them on the note. This kind of defense is not so fashionable as it once was and we ought not to be astute to extend it beyond the clear holding of the Massachusetts cases." This suggests that it is Justice Magruder's position that when no case squarely in point exists, a Federal court is free to fashion an independent judgment.

B. The Result Reached by the Circuit Court in its Application of Section 34 is in Conflict with Decisions of Other Circuit Courts of Appeals on the Same Matter.

Thus the Seventh Circuit Court of Appeals, in *New York Life Insurance Company* v. *Jackson*, 98 F. (2d) 950, writ of *cert. den'd*, 305 U.S. 640 (1938), has held that, when the precise question presented has never been decided by a State court, the Circuit Court may exercise its independent judgment on such a question. Accord, *Hagan & Company* v. *The Washington Water Power Company* (C.C.A. 7th, 1938), 99 F. (2d) 614.

The Fourth Circuit Court of Appeals, in *Travelers Indemnity Company* v. *Plymouth Box & Panel Company*, 99 F. (2d) 218 (1938), has held that, where the complaining party has not referred the Circuit Court to any statutes or judicial decisions of the State contrary to the views entertained by the trial court, the decision will be affirmed on appeal.

The Eighth Circuit Court of Appeals apparently follows the independent judgment view where no cases in point exist.

Cass Bank & Trust Company v. *Sheehan*, 97 F. (2d) 935 (1938).

A District Court case appears to be in accord with the view of the majority in the principle case, holding that, where State court decisions are conflicting or vague, or where there are no State court decisions, the Federal court may decide the matter on the basis of what it believes the State court will ultimately and authoritatively declare.

Sampson v. *Welch* (D.C. Calif., 1938), 23 Fed. Supp. 271.

C. Regardless of Which View This Court should Adopt as to the Proper Application of Section 34 of the Judiciary Act, a Reversal of the Circuit Court Opinion will be Required.

If this Court should decide, in accordance with the majority of the Circuit Court, that the duty of a Federal court where State decisions are conflicting, vague or non-existent is to decide the matter on the basis of what it believes the State court will ultimately and authoritatively declare, a reversal will be required, since, as has been set forth in Point I of this Brief, the Circuit Court was in error in its conclusion as to what a Massachusetts court would have done.

If the independent judgment position is adopted, a reversal is similarly required. It might be urged that the majority opinion in the Circuit Court represents the independent judgment of the Circuit Court justices involved. If this were so, petitioner concedes that a reversal would not then be required. It is obvious, however, that the majority did not intend to exercise its independent judgment. The language of the opinion clearly reveals the mental process engaged in by the majority in reaching its result. It is stated (R. 43): "While none of the Massachusetts cases above cited is squarely in point, we feel that the language used by the Court therein *indicates that it would be held in Massachusetts* that in the case at Bar no action could be maintained on the note." (Italics supplied.)

It follows, therefore, that if the duty of a Federal court in such a situation is to apply its independent judgment, the majority of the court in the case at bar have not done so,

and that the only way to ascertain the independent judgment of said court, is to reverse and remand the case at bar.

Respectfully submitted,

JAMES A. HERBERT,

Pro Se.

SELIG SELIGMAN,

Of Counsel.

(23)

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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 828

JAMES A. HERBERT, TRUSTEE,
Petitioner,

v.

WILLIAM F. SULLIVAN ET AL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Argument	4
I No Question of Federal Law Is Presented; and Even if There Were, There Is no Occasion for Review by This Court	4
A. The Inquiry into Massachusetts Law is Governed by the New Hampshire Law of Conflict of Laws and not by Section 34 of the Judiciary Act	4
B. Even if a Federal Question Under Section 34 of the Judiciary Act were Involved in this Case, This Court Has Already Established the Applicable Principle and There is No Conflict Among the Circuits	5
II The Decision Below Was in Conformity with Massachusetts Law of Ultra Vires Contracts	9
Conclusion	12

CITATIONS

Cases	PAGE
Burns Mortgage Co. v. *Fried*, 292 U. S. 487	7
Chester Glass Co. v. *Dewey*, 16 Mass. 94	9
Crab Orchard Improvement Co. v. *Chesapeake & Ohio Ry. Co.*, 115 F. (2d) 277, *cert. den.* 312 U. S. 702	7
Davis v. *Old Colony Railroad*, 131 Mass. 258	9
DeLong v. *Jefferson Standard Life Ins. Co.*, 109 F. (2d) 585, *cert. den.* 310 U. S. 635	8
Equitable Life Assurance Society v. *First National Bank*, 113 F. (2d) 272	7, 8
Erie Railroad v. *Tompkins*, 304 U. S. 64	5, 6, 7
Fidelity Union Trust Co. v. *Field*, 311 U. S. 169	6
Grafton Bank v. *Wing*, 172 Mass. 513	11
Griffin v. *McCoach*, 313 U. S. 498	5
Hawks v. *Hamill*, 288 U. S. 52	6
Jefts v. *York*, 10 Cush. (Mass.) 392	11
Klaxon Co. v. *Stentor Electric Mfg. Co., Inc.*, 313 U. S. 487	4
Lawrence v. *Toothaker*, 75 N. H. 148, 71 Atl. 534	12
Malloy v. *New York Life Ins. Co.*, 103 F. (2d) 439, *cert. den.* 308 U. S. 572	7, 8
McLean v. *Sidebottom*, 277 Mass. 158	9, 10
Moore v. *Illinois Central R.R.*, 312 U. S. 630	6
Morville v. *American Tract Society*, 123 Mass. 129	9
National Pemberton Bank v. *Porter*, 125 Mass. 333	9
National Shawmut Bank v. *Citizens National Bank*, 287 Mass. 329	9, 11
New York Life Ins. Co. v. *McKellar*, 68 N. H. 326, 44 Atl. 516	5

	Page
Nims v. *Mount Hermon Boys' School*, 160 Mass. 177	10
Nowell v. *Equitable Trust Co.*, 249 Mass. 585	9, 10
Old Colony Railroad v. *Evans*, 6 Gray (Mass.) 25	9
Princess Garment Co. v. *Fireman's Fund Ins. Co.*, 115 F. (2d) 380	7
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202	6
Sampson v. *Channell*, 110 F. (2d) 754, *cert. den.* 310 U. S. 650	5
Schwager v. *Schwager*, 109 F. (2d) 754	7
Slater Woolen Co. v. *Lamb*, 143 Mass. 420	9
Stoner v. *New York Life Ins. Co.*, 311 U. S. 464	6
Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478	6
Vandenbark v. *Owen-Illinois Glass Co.*, 311 U. S. 538	6
West v. *American Telephone & Telegraph Co.*, 311 U. S. 223	6
Wichita Royalty Co. v. *City National Bank*, 306 U. S. 103	6
Yoder v. *Nu-Enamel Corp.*, 117 F. (2d) 488	6, 7
Statutes	
Federal Judiciary Act of September 24, 1789, c. 20, §34, 1 Stat. 92	2
Judicial Code, Sec. 240(a)	2
Mass. G. L. (Ter. Ed.) c. 231 §132	10

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No. 828

JAMES A. HERBERT, TRUSTEE,
Petitioner,

v.

WILLIAM F. SULLIVAN ET AL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the District Court for the District of New Hampshire, filed March 17, 1941 (R. 12), is printed at R. 12 and is reported at 37 F. Supp. 468. The opinion of the Circuit Court of Appeals for the First Circuit, filed on November 14, 1941 (R. 40), is printed at R. 41 and is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered November 14, 1941 (R. 45). Petition for certiorari was filed December 31, 1941. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, §1, 43 Stat. 938).

QUESTION PRESENTED

1. Whether any question of federal law is involved, and if so, whether it requires any decision by this Court.

2. Whether the decision below that an action cannot be maintained on the express promise in an *ultra vires* contract is in conflict with applicable decisions in Massachusetts.

STATUTE INVOLVED

It is urged by petitioner that Section 34 of the Federal Judiciary Act of September 24, 1789 (c. 20, §34, 1 Stat. 92) is involved. That statute provides:

> "The laws of the several States, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

STATEMENT

The petitioner, trustee in bankruptcy of Commercial Brewing Company, a Massachusetts corporation, brought an action in the District Court for the District of New Hampshire against the respondents, executors of the estate of John D. Sullivan (late of Nashua, New Hampshire), on a promissory note in the amount of $5,000 payable to the bankrupt. Among the assets of the estate, of which the respondents were appointed executors by the New Hampshire Probate Court in February, 1932 (R. 12), were 430 shares of stock in the Commercial Brewing Company (R. 14, 22). As the decedent had operated this company prior to his death (R. 34, 14) and the company was very prosperous for several years prior to 1935 (R. 22), one of the executors went to Mr. Doherty, presi-

dent of the company, in October, 1935 to see if a dividend could be declared on the stock in order to provide the estate with money to pay its bills (R. 22, 32, 14). Mr. Doherty owned seventy per cent of the stock of the company and was opposed to the declaration of a dividend (R. 19, 22, 32). And he was not then buying any of the stock, although he was the only market for it (R. 33-34). The affairs of the estate were discussed, the difficulty of liquidating its assets appreciated and its need for cash to pay outstanding bills recognized (R. 33, 34). Mr. Doherty stated his willingness to help and agreed to furnish the estate with an amount sufficient for its needs, $5,000 (R. 33). In order to have a record, Mr. Doherty desired the transaction to be handled by the estate giving its note (R. 33, 34) with 100 shares of stock in the company as collateral which, valued by him as worth $100 a share, he considered more than ample to cover the corporation (R. 22-23, 24). Accordingly, the company gave a check payable to the John D. Sullivan Estate (R. 23), and took its note secured by the 100 shares of stock (R. 3, 16, 20, 29, 33). The note was payable at the office of the company in Massachusetts. It is undisputed that it was *ultra vires* the company to lend money (Petition 4; R. 43). The money was used to pay debts of the estate (R. 14, 24) and the executors personally received no benefit (R. 14, 16, 24). No interest was ever paid on the note, and no demand for any payment was made until nearly five years after the note was given when the company got into financial difficulties and went into bankruptcy (R. 13, 14, 20).

The petitioner brought his action on the note seeking to hold the respondents personally liable. The District Court gave judgment for the respondents (R. 16). And the court below affirmed on the ground that the present action on the express promise could not be maintained under Massachusetts law governing *ultra vires* transactions (R. 43).

ARGUMENT

It is contended by the Petitioner that when a federal court has to decide a question of state law on which there are no state precedents squarely in point, there is presented the federal question of whether the court shall decide what the state court would determine the law to be or shall exercise its own judgment as to what the state law is—a question in the decision of which, it is claimed, some circuit courts of appeal are in conflict. These contentions cannot be supported. The alleged federal question is not presented in this case; and even if it were, as the guiding principle has already been clearly established by this Court and the alleged conflict between Circuits is imaginary rather than real there is no occasion for review by this Court. The only question that is really presented is a point of Massachusetts law on *ultra vires* contracts on which there is no state court decision squarely in point, but in the determination of which the decision by the court below is plainly in conformity with settled principles of Massachusetts law.

I.

No Question of Federal Law is Presented; and Even if There Were, There is No Occasion for Review By This Court.

A. *The Inquiry into Massachusetts Law is Governed by the New Hampshire Law of Conflict of Laws and not by Section 34 of the Judiciary Act.*

The present action was brought in the federal court in New Hampshire. The decision of the case, therefore, under Section 34 of the Judiciary Act, required the application of New Hampshire law. And the New Hampshire law required to be applied includes its law of the conflict of laws. *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.,* 313

U. S. 487; *Griffin* v. *McCoach*, 313 U. S. 498; *Sampson* v. *Channell*, 110 F. (2d) 754, 759-62 (C. C. A. 1st), *cert. den.* 310 U. S. 650. In the application by the court below of the New Hampshire law of conflict of laws referring the decision of the point in issue to Massachusetts law (*New York Life Ins. Co.* v. *McKellar*, 68 N. H. 326, 330, 44 Atl. 516, 518) Section 34 of the Judiciary Act was admittedly complied with. What the duty of the court was in seeking to ascertain Massachusetts law and what the nature of its inquiry was to be in the absence of a Massachusetts precedent directly in point clearly are matters governed by the content of the New Hampshire law of conflict of laws. And no question is raised on that score. To attempt to raise a federal question under Section 34 of the Judiciary Act is to misapprehend the force of that statute. That statute cannot determine that duty and the nature of that inquiry; it required the application of New Hampshire law, but it does not and cannot operate further so as to prescribe the content of that law. *Erie R. R.* v. *Tompkins*, 304 U. S. 64.

Accordingly, even if the present case involved a question as to the manner in which Massachusetts law should be ascertained in the absence of a governing precedent, the question is not a federal one but a very narrow one in the application of the law of conflict of laws of New Hampshire alone.

B. *Even if a Federal Question under Section 34 of the Judiciary Act were involved in this Case, This Court Has Already Established the Applicable Principle and There is No Conflict Among the Circuits.*

The function of a federal court in deciding a non-federal question is settled and plain. It is no different in a case where there is no state law directly in point than in a case where there is. The guiding principle is clearly

and succintly stated in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, at 209:

> "The * * * federal court must * * * apply the entire body of substantive law governing an identical action in the state courts."

A federal court is to decide a case as nearly as possible in conformity with the decisions of the state court. See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483-84; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 468-69; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 107; cf. *Moore* v. *Illinois Cen. R. R.*, 312 U. S. 630, 633; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 180. Indeed, the latest state court determination must be followed even if it overrules an earlier state court decision which has been applied below by the federal district court. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538.

The duty thus clearly established is not "difficult or strange". *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 209. As in the case of matters known as "local" law before the *Erie* case, or of the construction of a state statute, the duty of the federal court is "in every case to ascertain from all the available data what the state law is". *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237. The available data includes not only considered dicta (*Hawks* v. *Hamill*, 288 U. S. 52) but "compelling inferences or logical implications from other related adjudications and considered pronouncements" (*Yoder* v. *Nu-Enamel Corp.*, 117 F. (2d) 488, 489 (C. C. A. 8th); see *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 469; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 239; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 484) of the state courts. It also includes any material to which the state court would resort for help in reaching a decision such as decisions elsewhere and the general principles of the

common law. See *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, 496.

If, therefore, any doubt ever existed as to the guiding principle in the decision of matters within the scope of the *Erie* case when there is no state decision directly in point, that doubt has now been dispelled. And if a conflict between the various circuits did exist, it is clear that the course followed by the court below of deciding the case as the state court would decide the same case —on the basis of the relevant data of state law—is the correct one.

There is in fact, however, in cases where there is no state law in point on the matter in issue, no doubt or conflict among the several circuits and no departure from the guiding principles already established. It is uniformly recognized by the several circuit courts of appeal, including those mentioned in the Petition and in later cases than those there cited, that the federal court is to look to such data on state law as is available and to any other relevant data. *Yoder* v. *Nu-Enamel Corp.*, 117 F. (2d) 488, 489 (C. C. A. 8th); *Princess Garment Co.* v. *Fireman's Fund Ins. Co.*, 115 F. (2d) 380, 383 (C. C. A. 6th); *Crab Orchard Impv. Co.* v. *Chesapeake & O. Ry.*, 115 F. (2d) 277, 279-280 (C. C. A. 4th), *cert. den.* 312 U. S. 702; *Equitable Life Assur. Soc.* v. *First Nat. Bank*, 113 F. (2d) 272, 273 (C. C. A. 5th); *Schwager* v. *Schwager*, 109 F. (2d) 754, 756, 759 (C. C. A. 7th); *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), *cert. den.* 308 U. S. 572. In the absence of a governing precedent in the state decisions, the federal court must necessarily decide the case according to its own judgment as to what the state law is. But, no different rule is applied by the court which says it is exercising its independent judgment in the light of applicable principles of state law than by the court which says it is deciding the case the way the state court would decide it. This is illustrated by the use of different language by the same court. Com-

pare majority opinion below with *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), *cert. den.* 308 U. S. 572; *Equitable Life Assur. Soc.* v. *First Nat. Bank*, 113 F. (2d) 272, 273 (C. C. A. 5th) with *DeLong* v. *Jefferson Standard Life Ins. Co.*, 109 F. (2d) 585, 586 (C. C. A. 5th), *cert. den.* 310 U. S. 635. The difference in words used by various judges, as in the opinions below, is one of form, not of substance. The difference is not in the rule followed, but only in the rhetoric used to express the same rule.

As the court below followed the guiding principle already established by this Court and there is no conflict among the several circuits, no occasion for any decision by this Court is presented. Moreover, no more precise rule than the principle already laid down can be formulated for the guidance of lower federal courts in cases where there is no state law in point. What the conclusion as to state law will be in any case must depend upon the nature of the relevent data available in that particular case. The strength of dicta, inferences or implications or the force of analogies found in state authorities and the weight to be given general common law principles or decisions elsewhere will vary with each case presented. No general formula can establish which of the available data will or should be most persuasive in the ascertainment of state law in any given case, as to which even within the same court, as in the court below, opinions may differ. To prescribe such a formula would be at variance with the established nature of the common law judicial process.

II.

The Decision Below Was in Conformity with Massachusetts Law of Ultra Vires Contracts.

The petitioner brought his action on the express promise to pay, seeking to hold the respondent executors personally liable for the loan made to the estate. Massachusetts has strictly adhered to the principle that an *ultra vires* contract is void. Accordingly, no action on the express promise of *either* party to the transaction has been allowed; recovery is allowed only in implied contract on the basis of benefit received by the defendant. *E. g., Morville* v. *American Tract Society,* 123 Mass. 129; *Nowell* v. *Equitable Trust Co.,* 249 Mass. 585, 599-603; *National Shawmut Bank* v. *Citizens National Bank,* 287 Mass. 329, 335-337.

The cases relied upon by petitioner establish no contrary rule. In the cases cited either the transaction was not *ultra vires* (*Chester Glass Co.* v. *Dewey,* 16 Mass. 94, 101; *Old Colony R.R.* v. *Evans,* 6 Gray, 25, 38-39) or the defendant could not rightly deny liability for the "value" (compare "price") of the goods actually received by him for which he was being sued (*Chester Glass Co.* v. *Dewey,* 16 Mass. 94, 101; *Slater Woolen Co.* v. *Lamb,* 143 Mass. 420, 421-422), or the *ultra vires* act sought to be set up was the acquisition by the corporation in a transaction with another than the defendant of property involved in the action by the corporation against the defendant, a defense properly denied (*National Pemberton Bank* v. *Porter,* 125 Mass. 333; see also *Davis* v. *Old Colony R. R.,* 131 Mass. 258, 271[1]). In *McLean* v. *Side-*

[1]It is to be noted that the quotation at the top of page 12 of the Petition is not, as stated, found in *Old Colony R. R.* v. *Evans,* 6 Gray, 25, or made with respect to "an *ultra vires* contract for the sale of land" as alleged, but is found in *Davis* v. *Old Colony R. R.,* 131 Mass. 258, 274 and constitutes comment on section 153 in *Angell & Ames, Corporations* dealing with the case of an agreement by a corporation to sell land to the defendant which it had acquired *ultra vires* from another.

bottom, 277 Mass. 158, where a corporation sued for money loaned, the defendant did not set up *ultra vires*, and the holding accordingly was that the defense was not available. And the comments of the court on the *ultra vires* question represent no departure from established principles. As the defect in the plaintiff's declaration for money lent had been cured by the addition of a count for money had and received and as it had been established by the judgment below that the defendant had received benefit, the court rightly said, under well settled rules requiring disposition of cases on appeal on the basis of the substantial rights of the parties (Mass. G. L. (Ter. Ed.) c. 231, §132), that no defect of substance was shown which at *that* stage of the case required a reversal. By relying upon the principle stated in *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177, 179, 180, the Court makes clear that the basis of recovery by a corporation which has lent money *ultra vires* is not the enforcement of an express promise but " 'something in the nature of an equitable estoppel' " so as to avoid the injustice that " 'one who had received the benefits of such a contract might retain them and leave the other party without remedy' " (277 Mass. at 160). And that it was not in any way intended in the *McLean* case to depart from established principles is made doubly clear by the court's statement (at p. 160):

> "The principles governing the rights of the parties are set forth at length in *Nowell* v. *Equitable Trust Co.*, 249 Mass. 585, 600-603, where numerous cases are collected."

In the *Nowell* case, after quoting the "just and salutary principle" stated in the *Nims* case, above referred to, the court, speaking through the same justice as in the

McLean case, clearly states the Massachusetts law governing here (p. 601):

> "It [that principle] is applicable to cases where the corporation setting up the defence of *ultra vires* has received property or gain through reliance by others upon its own conduct and thereafter seeks to retain the advantage it thus has secured by interposing as a shield its unlawful conduct. It is applicable also to cases *where the corporation sues to recover compensation for property or gain transferred by it* to a defendant who tries to escape just responsibility by setting up *ultra vires* conduct of the corporation. That path to avoid payment for what he has received is closed to such a defendant. . . . That principle is at bottom that, when in equity and good conscience one has property without right which ought to go to another, he cannot retain it. *The action is not on the express ultra vires contract but on an implied contract to return or make compensation for property or money which he has no right to retain.*" (emphasis supplied)

Also see *National Shawmut Bank* v. *Citizens National Bank*, 287 Mass. 329, 337.

The court below, therefore, correctly concluded, it is submitted, that under established principles of Massachusetts law the present action on the express promise cannot be maintained. The court did not pass on other remedies open to the Petitioner, but the present action seeking to impose personal liability upon the respondents must in any case be denied, since admittedly they received no personal benefit, and, as held by Shaw, C. J., in *Jefts* v. *York*, 10 Cush. (Mass.) 392, 395 and Holmes, J., in *Grafton Bank* v. *Wing*, 172 Mass. 513, 515, an executor or another acting in a representative capacity is not to be held personally liable when there is no intent he should be, the

clear understanding of all parties here (R. 16, 29, 32, 33, 35), as Petitioner admits (R. 19, 20). See also *Lawrence* v. *Toothaker,* 75 N. H. 148, 71 Atl. 534.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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